

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

05/03/02 PM 3:29

U.S. DISTRICT COURT
DISTRICT OF MASS.

THE GIVING BACK FUND, INC.,

Plaintiff,

v.

MARK STEVERSON, RUDOLPH &
BEER, LLP, LAURENCE H.
RUDOLPH and CORINA BIGGAR,

Defendants.

CIVIL ACTION NO. 02-104446-RWZ

PLAINTIFF'S MOTION TO STRIKE "DECLARATIONS"
OF LAURENCE H. RUDOLPH AND MARK STEVERSON

Plaintiff The Giving Back Fund, Inc. ("GBF") hereby moves to strike the "Declarations" of Laurence H. Rudolph and Mark Steverson. In support of this motion, GBF states as follows:

1. On April 5, 2002, defendants filed a Motion to Dismiss this matter on the bases of lack of personal jurisdiction and failure to state a claim upon which relief may be granted.
2. The Motion is based on alleged facts presented in two pleadings called "Declaration" submitted by both defendants Steverson and Rudolph.
3. Each "Declaration" is an unsworn written document which contains allegations that are stated to be "true under penalties *of forgery*." (See Declaration of Laurence E. Rudolph at 2; Declaration of Mark Steverson at 2) (emphasis added).
4. Pursuant to Fed. R. Civ. P. 43(e), motions based on facts not in evidence, such as defendants' Motion to Dismiss, may only be heard by the Court when supported by affidavits, absent oral testimony or deposition.

DOCKETED

11

5. The "Declarations" of both Laurence H. Rudolph and Mark Steverson fail to meet the Rule 43(e) standard as they are not "affidavits." See Black's Law Dictionary 58 (7th ed. 1999) (defining "affidavit" as "[a] voluntary declaration of facts written down *and sworn to by the declarant* before an officer authorized to administer oaths") (emphasis added). The "Declarations" should therefore be stricken.

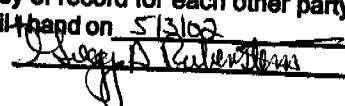
6. The "Declarations" of both Laurence H. Rudolph and Mark Steverson do not satisfy the requirements of 28 U.S.C. § 1746, which allows for unsworn declarations "under penalty of perjury. . ." to substitute for required affidavits. (emphasis added). The "Declarations" should therefore be stricken.¹

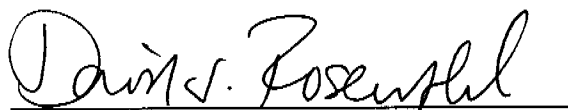
WHEREFORE, plaintiff requests that this Court to strike the "Declarations" of Laurence H. Rudolph and Mark Steverson.

Respectfully submitted,

THE GIVING BACK FUND, INC.

By its attorneys,

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by mail hand on 5/3/02




David S. Rosenthal (BBO #429260)
Gregg A. Rubenstein (BBO #639680)
Hutchins, Wheeler & Dittmar
101 Federal Street
Boston, MA 02110
(617) 951-6600

Dated: May 3, 2002

¹ Both Rudolph and Steverson are attorneys. Defendants also submitted the Affidavit of Corina Biggar, in proper form, so they appear to know what is required by Rule 43(e).